Hong Yik Plastics (M) Sdn Bhd v Ho Shen Lee (M) Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCVC)(W)-1790–09 OF 2018
VERNON ONG, SURAYA OTHMAN AND HAS ZANAH MEHAT JJCA
11 NOVEMBER 2019

Civil Procedure — Trial — Denial of fair trial — Trial judge interfered constantly while plaintiff's witnesses were testifying at trial — Judge frequently cut off counsel and posed her own questions to witnesses, rebuked them with intemperate, threatening, overbearing and intimidating language, and even told plaintiff's witnesses at outset that they had no case — Whether trial judge's conduct denied plaintiff of fair trial — Whether decision of trial judge had to be set aside and retrial ordered before a different judge

The appellant relied on 'unfair judicial treatment' as its main ground in the instant appeal to set aside the High Court's dismissal of its claim against the respondents for infringement of patent. The appellant contended that it was denied of a fair trial by the trial judge's open hostility towards its witnesses, her constant interruptions while they were testifying, including making of unwarranted, rude and adverse comments against them and even telling them at the outset that they did not have a case. Relying upon excerpts from the notes of evidence of the trial, the appellant pointed out countless instances where the trial judge had disrupted counsel's questioning of the witnesses by interrupting and posing questions of her own to them, cutting them off mid-way while they were trying to explain an issue and generally behaving in such an overbearing, intemperate, threatening and intimidating manner that witnesses and counsel could not carry out their respective functions properly. The respondents conceded that their witnesses had also suffered the same treatment as the appellant's witnesses but submitted that despite her shortcomings, the trial judge's decision should not be set aside as it was made upon a proper consideration of all the evidence adduced.

Held, setting aside the trial court's decision and ordering a retrial before a different judge:

(1) Justice did not exist in substantive law alone. Justice in the application of substantive law was dependent on the pre-existent fairness of the procedure; in other words, procedural due process in the trial of the cause. Procedural due process was not only for the parties, but also for the court itself. Only thereby could the court maintain its conscience and

dignity. Only thereby could it appeal to and justify the trust and confidence of the public (see para 11).

(2) The appellant had made out its complaint of unfair judicial treatment. The excerpts from the notes of proceedings showed the trial judge's frequent interventions when the appellant's witnesses were testifying (in chief and under cross-examination) were highly unusual and disconcerting. On numerous occasions, the trial judge appeared not only to have descended into the arena, cast off the mantle of impartiality and prejudged the issues, but had also employed intemperate, threatening, overbearing and intimidating language. One was left with the impression of a judge who, if not partisan, was openly hostile towards the appellant. The trial judge did not conduct herself as a neutral umpire at the trial (see paras 4, 17 & 19).

(3) The trial judge's conduct was hardly the affirmative duty of a trial judge — to be patient, dignified and courteous to litigants, witnesses and counsel. On the totality of the evidence, she had not only seriously transgressed the fundamental principle that she should have remained neutral during the evidence-taking but she had also acted in a manner which was, at times, manifestly unfair and hostile to the appellant. Her excessive interventions were of such magnitude that it called for the judgment to be reversed (see paras 22–23).

(4) The appellant was denied of a fair trial by an impartial tribunal. The nature, tenor and frequency of the trial judge's interventions were such that this court had to set aside the trial court's decision and order a new trial before another judge (see paras 24–25).

[Bahasa Malaysia summary

Perayu bergantung kepada 'unfair judicial treatment' sebagai alasan utamanya dalam rayuan ini untuk mengetepikan penolakan Mahkamah Tinggi untuk tuntutannya terhadap responden kerana pelanggaran paten. Perayu menegaskan bahawa ia dinafikan perbicaraan adil disebabkan penentangan terbuka hakim perbicaraan terhadap saksi-saksinya, gangguan berterusan beliau semasa mereka memberi keterangan, termasuk membuat komen yang tidak berasas, kasar dan buruk terhadap mereka dan juga memberitahu mereka pada awal lagi bahawa mereka tidak mempunyai kes. Bergantung kepada petikan daripada nota-nota keterangan perbicaraan, perayu menegaskan contoh yang tidak terkira banyaknya di mana hakim perbicaraan telah mengganggu soalan peguam kepada saksi dengan menyampuk dan mengutarakan soalan beliau sendiri kepada mereka, memotong penjelasan mereka semasa mereka cuba untuk menerangkan sesuatu isu dan secara amnya berkelakuan secara melampau, tidak terkawal, mengancam dan mengganggu saksi-saksi dan peguam tidak dapat menjalankan fungsi masing-masing dengan betul. Responden-responden mengakui bahawa saksi-saksi mereka

juga telah mengalami layanan sama seperti saksi-saksi perayu tetapi berhujah bahawa meskipun dengan kekurangannya itu, keputusan hakim perbicaraan itu tidak patut diketepikan kerana ia dibuat dengan pertimbangan sewajarnya berdasasrkan semua keterangan yang telah dikemukakan.

Diputuskan, mengetepikan keputusan mahkamah pericaraan dan memerintahkan perbicaraan semula di hadapan hakim yang berbeza:

(1) Keadilan tidak wujud dalam undang-undang substantif sahaja. Keadilan dalam permohonan undang-undang substantif bergantung kepada keadilan yang telahpun wujud dalam suatu prosedur; dalam erti kata lain, proses prosedur yang sewajarnya dalam perbicaraan suatu kausa itu. Proses prosedur yang sewajarnya bukan sahaja untuk pihak-pihak, tetapi juga untuk mahkamah itu sendiri. Dengan itu sahaja mahkamah boleh mengekalkan hati nurani dan maruahnya. Dengan itu sahaja ia boleh membuat rayuan kepada dan mewajarkan kepercayaan dan keyakinan orang ramai (lihat perenggan 11).

(2) Perayu telah membuat aduannya berhubung layanan kehakiman yang tidak adil. Petikan daripada nota-nota prosiding menunjukkan campur tangan hakim yang kerap apabila saksi-saksi perayu memberi keterangan (utama dan dalam pemeriksaan balas) yang sangat luar biasa dan membingungkan. Pada masa-masa tertentu, hakim perbicaraan bukan hanya muncul di arena, dengan menunjukkan sikap tidak adil dan memperdebatkan isu-isu, tetapi juga menggunakan bahasa yang mengutuk, mengugut, keterlaluan dan menakut-nakutkan. Seseorang itu akan mendapat gambaran yang hakim itu, jika tidak partisan, secara terbuka bermusuhan terhadap perayu. Hakim perbicaraan tidak bertindak sebagai pengadil yang saksama dalam pernicaraan tersebut (lihat perenggan 4, 17 & 19).

(3) Tingkah laku hakim pericaraan tidak langsung menggambarkan tugas sebenar hakim perbicaraan — untuk bersifat sabar, bermaruah dan sopan kepada litigan, saksi dan peguam. Berdasarkan keseluruhan keterangan, beliau bukan sahaja melanggar prinsip asas bahawa beliau sepatutnya kekal neutral semasa keterangan diambil tetapi beliau juga telah bertindak dengan cara yang kadang-kadang tidak adil dan bersikap bermusuhan dengan perayu. Campur tangan yang berlebihan itu begitu ketara sehingga ia mewajarkan agar penghakiman tersebut diakas (lihat perenggan 22–23).

(4) Perayu dinafikan perbicaraan yang adil oleh tribunal yang saksama. Sikap, niat dan kekerapan campur tangan hakim perbicaraan adalah sedemikian rupa sehingga mahkamah ini terpaksa mengetepikan keputusan mahkamah perbicaraan tersebut dan memerintahkan perbicaraan baru sebelum hakim lain (lihat perenggan 24–25).]

Cases referred to

Serafin v Malkiewicz and others [2019] EWCA Civ 852, CA (refd)
Yuill v Yuill [1945] P15, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 71, s 71(1), (2)
Federal Constitution art 8

Appeal from: Suit No BA-22NCVC-157–03 of 2017 (High Court, Shah Alam)

Nashvinder Singh Gill (Gurdit Singh, Yang Tek Yeh and Melody Woon Sze Mun with him) (Aziz & Co) for the appellant.
Cyndi Chow Li Kian, Jolene Tham and Ong Hui Yi with her) (Josephine, LK Chow & Co) for the respondent.

Vernon Ong JCA (delivering judgment of the court):

INTRODUCTION

[1] At the High Court, the plaintiff filed an action against the defendant for infringement of the plaintiff's patent. The plaintiff sought a declaration, injunctive orders, account, damages to be assessed, aggravated damages and exemplary damages. In response, the defendant counter-claimed for a revocation of the patent and a declaration of non-infringement. After a full trial, the learned judge dismissed the plaintiff's claim and allowed the defendant's counterclaim. This is the plaintiff's appeal against the decision of the High Court. In this judgment the parties shall be referred to as they were in the court below.

[2] Having had the benefit of perusing the appeal record, the written judgment of the High Court and the comprehensive written submissions of both parties, we invited learned counsel for the plaintiff and defendant respectively to address us on the first issue relating to unfair judicial treatment. If we found no merit on the first issue, we would then proceed to hear counsel on the remaining issues.

[3] We adopted this course of action because in the event a new trial was ordered, we do not think that it would be proper for this court to rule on the other issues which relate to questions of mixed fact and law. These issues would be for the trial judge at the new trial to rule on.

[4] After hearing of submissions of counsel, we were of the unanimous opinion that the plaintiff's complaint of unfair judicial treatment was made

A out; and that in the particular circumstances of this case we were constrained to order a new trial before another judge. Consequently, the order of the High Court was set aside with no order as to costs. We now give our reasons for our decision.

B SUBMISSIONS

[5] Learned counsel for the plaintiff submitted that plaintiff did not have a fair trial. During the course of the hearing the trial judge had consistently interrupted and interjected in the examination of the plaintiff's witnesses PW1 and PW2. In particular, the trial judge also made it clear at the beginning of the hearing that she disbelieved the plaintiff's witnesses. The trial judge also made unwarranted adverse comments against PW1 and PW2 in the course of their testimonies given them enormous pressure and fear affecting their ability to testify and making it difficult for the plaintiff to present its case. The trial judge also pre-judged the case almost at the beginning of the hearing when PW1 was giving his evidence in chief. As such the trial judge had descended into the arena when she ought not to have done so.

[6] To support his arguments, learned counsel alluded to the notes of proceedings where the trial judge was manifestly unfair and hostile towards the plaintiff's witnesses. As such, the trial judge had transgressed the core principle that a judge remains neutral during the proceedings.

[7] In reply, learned counsel for the defendant conceded that the trial judge's conduct was condescending but added that the defendant's witnesses were also chided. However, the trial judge allowed the evidence to come through the witnesses throughout the five days of hearing. The trial judge's comments in English were directed at the plaintiff's counsel and not at the plaintiff's witnesses who did not understand English. At any rate, the plaintiff's evidence was poor and the plaintiff did not apply for the trial judge to be recused. The plaintiff was not prevented from producing evidence at the hearing. As such, the trial judge's conduct and her remarks did not interfere with the giving of evidence at the hearing. There was no interference with the finding of fact. The trial judge's decision was made on a consideration of the evidence at the hearing and is correct in fact and in law. There is therefore no basis for a new trial.

DECISION

[8] Although appeals to the Court of Appeal are by way of re-hearing, the Court of Appeal may on the hearing of an appeal make an order for a new trial. Section 71 of the Courts of Judicature Act 1964 ('the CJA 1964') empowers the Court of Appeal to order a new trial in two different sets of circumstances. One is where it can be shown that there is improper admission or rejection of

evidence at the original trial, the Court of Appeal may only order a new trial if it is satisfied that 'some substantial wrong or miscarriage of justice has been thereby occasioned' (sub-s (2)). The second arises under sub-s (1) which provides that the Court of Appeal shall have power to order a new trial by the High Court on grounds other than that of improper admission or rejection of evidence. In this appeal, the plaintiff's argument in support for a new trial is founded on unfair judicial treatment and not for improper admission or rejection of evidence; as such, the principles that fall to be considered under sub-s (2) are not applicable.

Adversarial legal system

[9] The role of judges differ depending on the legal tradition adopted in a particular country. There are essentially two types of legal traditions governing the nature of adjudication around the world: adversarial and inquisitorial systems. Common law countries like Malaysia use an adversarial system to determine facts in the adjudication process. The adversarial system is based on the opposing parties acting as adversaries who compete to convince the judge that their version of facts is the most probable. The judge presides over the trial as an impartial referee; in that capacity he rules on disputed issues of procedure and evidence, asking questions of witness when it is necessary to clear up any point that has been overlooked or left obscure; to see that counsel behave themselves seemly and keep the rules laid down by law; and to exclude irrelevancies and discourage repetition. The role of the judge is to hold the balance between the contending parties without himself taking part in their disputations. The adversarial system assumes that the best way to get to the truth of a matter is through a competitive process to determine the facts and application of the law accurately. In contrast, the inquisitorial system is associated with civil law systems. It is characterised by extensive pre-trial investigation conducted by an investigating magistrate as a means of seeking the truth. This means that there is a thorough review of the facts prior to the commencement of a trial.

RIGHT TO A FAIR TRIAL

[10] A fair trial is generally defined as a trial by an impartial and disinterested tribunal in accordance with law. The right to a fair trial is generally construed in the light of the rule of law. The right to a fair trial is also a fundamental right pursuant to art 8 of the Federal Constitution which provides for equality before the law and equal protection under the law; otherwise described as the principle of equality among citizens. In this connection, the common law has long recognised two minimum fair trial guarantees known as the principle of natural justice: (a) the principle of judicial impartiality (*nemo judex in causa sua*); and (b) the right to be heard (*audi alteram partem*) (Jackson, P, *Natural Justice* (2nd Ed, Sweet & Maxwell, London 1973). The right to a fair trial has

A also evolved to encompass a right to access to the courts, public hearings and a hearing within a reasonable time.

[11] In both civil and criminal cases rights exist and are being adjudged. In each the same inherent and constitutional rights exist. In each the duty of the
B trial judge is the same. In each the parties are entitled to justice under law. Concomitant with this is the trial judge's duty to determine and apply the law applicable to the facts found. To the lowest and humblest, to the weak, the poor, and to the strong, the same law applies. To be equally administered by a
C judge. However, justice does not exist in substantive law alone. Justice in the application of substantive law is dependent on the pre-existent fairness of the procedure; in other words, *procedural due process* in the trial of the cause. Procedural due process is not only for the parties, but, also, for the court itself. Only thereby can the court maintain its conscience and dignity. Only thereby
D can it appeal to, and justify the trust and confidence of the public.

[12] Under our system of adversarial trials, the only participant impartially seeking the true facts and the applicable law is the trial judge. To achieve his purpose and objective in a just manner and with just results, the trial judge is
E under a duty to see that justice is done; by rendering to every person his due under the same law, equally, fairly, and impartially applied and administered, without bias, without prejudice, without passion, and irrespective of race, creed, economic or social status. In this connection, the duty of the trial judge extends to the preservation of the rights of litigants and a proper disposition of
F the matters in dispute. It is also the trial judge's duty to, inter alia: protect witnesses from irrelevant, improper or insulting questions; allow them to be detained only so long as the interests of justice require; allow them to be examined only as to matters legal and pertaining to the issue; advise them of their right not to give an answer which will tend to incriminate them or one
G which will directly tend to degrade their character, unless it be the fact in issue or a fact from which the fact in issue would be presumed.

[13] Accordingly, when the parties have finally arrived at trial, they are entitled to, and it is the trial judge's duty to give to them and to their cause, the
H calm and deliberate hearing, consideration, and study that the ideal of justice demands. A trial judge must treat lawyers, litigants and witnesses with respect and must refrain from comments that suggest that he has made up his mind in advance.

I PRINCIPLE OF FAIRNESS

[14] At the heart of the right to a fair hearing is the principle of fairness. In the context of unfair judicial treatment, we think that the principle of fairness enunciated by the Court of Appeal in *Serafin v Malkiewicz and others* [2019]

EWCA Civ 852 paras 108–112 is apt:

> 108 It is a fundamental tenet of the administration of law that all those who appear before our courts are treated fairly and that judges act — and are seen to act — fairly and impartially throughout a trial.
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> 109 It is perfectly proper — indeed a duty — for a judge to intervene in the course of witness evidence for the purposes described by Rose LJ in *R v Tuegel* [2002] Cr App R 361, namely, 'to ask questions which clarify ambiguities in answers previously given or which identify the nature of the defence, if this is unclear'.
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> 110 It is wrong, however, for a judge 'to descend into the arena and give the impression of acting as advocate' (per Lord Parker CJ in *R v Hamilton* (unreported, 9 June 1969) cited by the Court of Appeal in *R v Hulusi* (1973) 58 Cr App R 378, 382).
>
> 111 In *Michel v The Queen* [2009] UKPC 41, Lord Brown JSC, giving the judgment of the Court, made it clear that the issue whether a trial has been fair was not to be judged merely by the correctness of the result:
>
> > 27 There is, however, a wider principle in play in these cases merely than the safety, in terms of the correctness, of the conviction. *Put shortly, there comes a point when*, however obviously guilty an accused person may appear to be, *the appeal court reviewing his conviction cannot escape the conclusion that he has simply not been fairly tried*: so far from the judge having empired the contest, rather he has acted effectively as a second prosecutor ...
> >
> > 28 Lord Bingham was, of course, right to recognize that by no means all departures from good practice render a trial unfair ... *Ultimately the question is one of degree* ...
> >
> > 31 ... [N]ot merely is the accused in such a case deprived of 'the opportunity of having his evidence considered by the jury in the way that he was entitled'. *He is denied too the basic right underlying the adversarial system of trial, whether by jury or jurats: that of having an impartial judge to see fair play in the conduct of the case against him*. Under the common law system one lawyer makes the case against the accused, another his case in response, and a third holds the balance between them, ensuring that the case against the accused is properly and fairly advanced in accordance with the rules of evidence and procedure. All this is elementary and all of it, unsurprisingly, has been stated repeatedly down the years. *The core principle, that under the adversarial system the judge remains aloof from the fray and neutral during the elicitation of the evidence applies no less to civil litigation than to criminal trials*. (Emphasis added.)
>
> 112 These principles, of course, apply with equal vigour whether or not litigants are legally represented. Indeed, so far as litigants in person are concerned, judges and tribunals should be (and generally are) especially conscious to ensure the dictates of fairness are observed — and seen to be observed — at all times and that due allowance is always made for language and other difficulties.

[15] It follows from a distillation of the above cited principles that a civil proceeding is generally considered fair if the parties have been given the opportunity to be heard, when it is conducted within a reasonable time and in such a manner that parties are given a reasonable opportunity to present their case to the court under conditions which do not place one of them at substantial disadvantage vis a vis the other.

[16] We now turn to the plaintiff's counsel's written submission, and in particular, the excerpts from the notes of proceedings which learned counsel relied on as instances of the trial judge's excessive and unwarranted judicial intervention. For completeness, we attach to this judgment at annexure 'A' these excerpts.

[17] On a perusal of these excerpts, in particular the bold and underlined passages, it was immediately apparent to us that the trial judge's frequent interventions during the plaintiff's evidence (in chief and under cross-examination) were, not to put too fine point on it, highly unusual and disconcerting. On numerous occasions, the trial judge appears not only to have descended into the arena, cast off the mantle of impartiality and prejudging the issues, but also to have employed language which was intemperate, threatening, overbearing and, frankly, intimidating. One is left with the impression of a judge who, if not partisan, was openly hostile towards the plaintiff.

[18] At the hearing of the appeal, we asked learned counsel for the defendant whether she found those passages unusual and troubling. Whilst she candidly conceded that they were, she countered that: (a) the defendant's witness also suffered the same treatment; (b) nevertheless, the trial judge was very pleasant and considerate when she met counsel in her chambers; and (c) the judge allowed all the evidence to come in.

[19] In the particular circumstances of this case, we are constrained to express our deep concern with the repeated interruptions, demands and criticisms by the trial judge. We are satisfied that the plaintiff's complaints have been made out. The trial judge did not conduct herself as a neutral umpire at the trial.

[20] Apart from these excerpts, learned counsel for the plaintiff also cited from the notes of proceedings when SP1 was under cross-examination.

YA: *And now say I agree. If the corned bead that is something that already been patented. Does the Plaintiff wish to reconsider his case?*

JEL: I'm sorry, Yang Arif?

YA: You're not with me? Day dreaming. In light of all his answer now, we know how it go. His invention, so to speak, is being queried, is being challenged. An inventor should be very able to show the court how he come up with the invention. I recalled that I mention that it took how many years? 6 years, 7 years for the patent office to actually gave him a patent. That is one issue on the side. The other thing is now in court today on a challenge you must no show to me that, 'hey I'm the inventor, from scratch I came up with a feather, with this feather which has a little bit of thing and then it fell into some color then I realised I could write for quite a while with it and from that I try to develop something that can be attached to the tip so that there 'II be a continue flow of color so I can write longer and after the second ring blab/a and eventually I invented a fountain pen'. Who invented the fountain pen? God knows but as an example I can show steps of the way how I did it and eventually I sent it for patents and no I patented all the fountain pens. Parker, Sheafer, better pay be my patent. So when challenged somebody says I got it I can show when I started what year how I progress. *Now we come to this plaintiff PW1, he is not showing me anything you know. But the worse thing is that there is a US Patent for the same thing. The corner bead. But the problem with him is that his inability to show, for him to explain to us how he went about, doing, making something to be more or otherwise. Cause everything he has depended on the patent agent who is not a witness so there is a very big vacuum there and when we look at him as a witness who requires translation from Mandarin to English and the technicality of-technical nature of pages 3 or 4 right to 17.* Then the question is how much of it is his and how much of it was the patent agent and how much of it was patent through existing documentation on the US Patent. We'll be going into details.

JEL: Yes

YA: *So I'm wondering at this stage in light of his fast answer that yes the corner bead which he gave to the agent to prepare the technical drawings. That corner bead together with his oral instructions forms the so-called invention. And now he says he agrees that the corner bead which he showed to his agent that he draw, draw, draw, draw, draw that obviously I cannot draw anything, similar to the US one. Would you like to consider?*

JEL: Yang Arif, may I just — try something —

YA: No, I don't want you to reply. I only ask you whether the Plaintiff would like to consider or re-consider its case.

JEL: No. I think with regards to the last answer, that is something the witness-

YA: Ok. We're going on and on and if there is no good change for successful outcome, I think it'll be very foolish to go on. But I do

not want to hear submissions at this stage. I'm merely asking whether maybe you should ask him, you should actually ask him because it is not your case, it is his case. Whether *in light of these answer, he wants to reconsider his case.*

JEL: Yes, Yang Arif. But I would need to consult —

YA: Go towards approach him and talk to him — softly. I cannot keep going up and down. Never mind. You go and talk to him. Talk to him quietly.

[21] It is apparent that the trial judge has pre-judged the probable failure of the plaintiff's case when she asked the plaintiff's counsel whether the plaintiff wanted to reconsider their case; and when the plaintiff's counsel was slow on the uptake, the trial judge remarked 'You're not with me? Day dreaming ...'. When the plaintiff's counsel wanted to say something the trial judge was also emphatic when she said 'No. I don't want you to reply. I only asked you whether the Plaintiff would like to consider or re-consider its case'. Equally cutting were her following remarks 'Ok. We're going on and on and if there is no good change [sic] for successful outcome I think I'll be very foolish to go on. ... Whether in light of these answer, he wants to reconsider his case'.

[22] We are of the view that such judicial conduct can hardly be equated with the affirmative duty of a trial judge — to be patient, dignified and courteous to litigants, witnesses and counsel. On the totality of the evidence on the record, we are bound to hold that the trial judge not only seriously transgressed the fundamental principle that she should have remained neutral during the evidence, but she also acted in a manner which was, at times, manifestly unfair and hostile to the plaintiff.

[23] Whilst not all departures from good practice render a trial unfair, in the final analysis, the question is one of degree. This is not a case of a non-speaking judgment by the trial judge or the absence of any finding of fact on a particular issue; in such instances, an appellate court is duty bound to endeavor to make its own findings of fact, based on the evidence on the record. This is also not an instance where a new trial may be prejudicial to the parties and an unnecessary inconvenience to the witnesses. This is a case of excessive interventions by the trial judge; which fact adds great weight to the substance of the appeal. In these circumstances, the criticism of the trial judge is of such magnitude as to constitute by itself a sufficient ground for reversal of the judgment.

[24] We think it necessary to emphasise the importance of the trial judge not to descend into the arena and thereby depriving herself of the ability to take a detached view when forming her conclusion. Indeed, it was Lord Greene MR who explained that justice is best done by the judge who holds the balance between the contending parties without himself taking part in their

disputations (*Yuill v Yuill* [1945] P15). This is an instance where the plaintiff was denied a fair hearing in the sense that he was not accorded his right to be heard by an impartial tribunal. We have carefully considered and reflected on this matter and are constrained to hold that the nature, tenor and frequency of the trial judge's interventions were such that the plaintiff was denied a fair hearing; thereby warranting the Court of Appeal exercising its discretion (such discretion which is only exercised save in rare and exceptional circumstances) to order a new trial so that the plaintiff can be afforded his day in court and to a fair hearing under substantive and procedural law.

[25] For the foregoing reasons, we ordered a new trial before another judge. The order of the High Court was set aside. We also made no order as to cost of this appeal.

ANNEXURE 'A'

Annexure A

(Excerpts from Notes of Proceedings)

(YA: Judge, SP1 & SP2: Appellant's witnesses, JEL: Appellant's Counsel, LKC: Respondents' Counsel)

1. **Cross-examination of SP1**

a) **see AR Vol.2(1), p188**

"LKC: The Defendant says that you are not the inventor of this patent and they would like to invalidate your patent. They put you to strict proof. Other than your patent certificate, how else can you prove that you are the inventor?

YA: How else can you prove you are the inventor of P1?

LKC: Yes.

SP1: Yang Arif, prior to my invention of P1-

(witness answered halfway in mandarin but was interrupted)

*YA: **Apart from your patent certificate, how else can you prove you are the inventor of P1? I don't want to hear any long story, how else can you prove you are the inventor?***

SP1: I have my sample, Yang Arif.

*YA: **Quote inverted comma, "I have my sample". Close inverted comma. Tell him that doesn't help**."*

b) **see AR Vol.2(1), p189**

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A

"LKC: In the process of this invention, did he come out with drawings or any blueprints?

B

SP1: No.

YA: No. I did not come up with.

C

SP1: No. I did not come out with the blueprints prior to this invention, Yang Arif. In fact I went to the site and have physical test on this product.

YA: We're talking about before he make the product, You're going to the site. We're talking about how you come out with the invention. You can't tiba-tiba go out to the site and test out the product.

D

LKC: So his answer is no drawing?

E

YA: No blueprint.

SP1: Yes. Yang Arif. I do not have any blueprint.

YA: So the question is how did you. What did you do? How did you did? You did research. You say you did research. So what did you do?

F

SP1: I do researches prior to the invention of this P1 because at that time I-
(witness answered halfway in mandarin but was interrupted)

G

YA: We are we are. No. That's not answering the question.

SP1: The research work, Yang Arif, is to invent the product which is to make the water flow into-

H

(witness answered halfway in mandarin but was interrupted)

YA: I don't understand. I don't understand you.

2

I

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A

SP1: *Is how to make this product to stop water from coming out.*

YA: *To stop water from coming out.* ***What are you talking about. You're not making sense.***

B

LKC: *Never mind, Yang Arif. I move on. I put some easier question.*

YA: *No. Because the thing is the idea here. He says he is the inventor, the fact that he is he is the inventor of P1 is being challenged. You have ask him question. How did you come out with this invention? So he is supposed to take us from I did this, I did this, I did this and there is no blueprint but all he can tell me is already got the thing! Go and test on site! That doesn't help you. Because you already skip all the part where we want to know. What he has done to invent this thing, Only then is invented then you can test it. But he has gone straight to testing. I want to know what he did. There are no blueprints. Is this yours. Is it something already there? He is being he is that this P1. Its invention is being challenge. He was going to tell us how he invented it.* ***All witnesses not giving evidence are out.*** *For both sides. Look around.*

C

D

E

SP1: *Yang Arif, as I in this industry for more than 30 over years, so I have the idea of how to invent this product.*

F

YA: ***I am laughing because you are not helping your case.*** *Question is how did you invented P1. Answer quote inverted comma because I have been in the industry for more than 30 years so I know how to invent the product. Close inverted comma.* ***Court notes not answering question. Counsel take note. He is not answering the question and I have recorded all. Whatever he talk nonsense I'll put in inverted comma.*** *Verbatim. Verbatim. Because I've been in the industry for more than 30 years so I know how to invent the product. Question is ow do you invent it? Because I've been in this – I know how to invent it."*

G

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c) **see AR Vol.2(1), p196-197**

B

"LKC: Does he agree with me that he should put it in because his patent now is being challenge?

JEL: Sorry Yang Arif.

C

YA: No. It should be in. He is the one who did all these. He gave all these.

JEL: Yes, Yang Arif. But then the question is asking for the witness opinion. Do you agree you should, Do you agree you should not. These are all opinion evidence.

D

YA: Not opinion. It is his case. This is not opinion. Sit down. You don't know what is opinion. Ok. Answer this question. Your invention is being challenge. All these detail should be in.

E

SP1: I do not agree personally.

YA: Do not agree that the details of prior art should be disclosed since my invention is being challenge. I'm asking him now what is prior art. Does he know or not? What is prior art? It is not a lukisan.

F

SP1: I do not know what is the prior art.

YA: How did you put these prior art in? 56 prior art. Question by court what is prior art. Answer do not know. If you do not know how did you put in? If you do not know how can you answer that no need to disclose this.

G

SP1: Because I gave the patent agent to handle these Yang Arif."

H d) **see AR Vol.2(1), p198-199**

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"SP1: Yang Arif, for this document, for those technical things, I was the one who furnish. For those wording and those legal things was done by my patent agent.

B

YA: Prior art is technical or legal or what?

SP1: This is documentation. Prior art.

C

YA: I don't know I don't know. ***Court notes from witnesses answers, the Court's suspicions are as to whether it is this witness who is the source of pages 4-17 or the patent agent or mix of both****. Does it mean therefore we have to go through each and every page 4 to 17 to find out which part of it is his and which part of it is the patent agent's.* ***Because it would look from just from a page 4 we're already left in doubt. So I have placed my suspicions as to whether the witness is the author of pages 4 to 17...3 to 17 if at 3 itself we already have doubt****. So it may be necessary therefore to go through each and every page.*

D

E

LKC: Yang Arif, I only wish to pick on 2 issues further on this. I don't want to be too technical and I don't think he is able answered. So I am going to-

YA: But he is the inventor he should be able to answer. It's in his interest if he cannot answer."

F

e) **see AR Vol.2(1), p201-202**

"YA: The question is yes, I gave the patent agent something to look at. I informed him as well as I have him something to see. So question do you have the thing that you show to the patent agent? The thing that you show him and he draw this. Yes, it is A3. I look at A3 is wrong.

G

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SP1: Because the patent agent do not know how to draw it out so I need something to show it to him to let him see to enable him to come out with the drawing.

B

YA: But if the patent agent follow that he wouldn't get page 14. Court notes I have look at A3 and it is clear that A3 and the drawings on page 14 are different.

C

SP1: Yang Arif, the witness said that although this two-
(the witness answered halfway in mandarin but was interrupted)

YA: You ask- Patent agent don't know anything. He is not the inventor. You are the inventor. Ask him to draw, you told, told, told, you tell, tell, tell, whether I can draw then you say you give him something to see. This thing to see together with that you tell him then he drew. Therefore, this thing should have those identical things that's why you can draw the lines, the grids, the 14 and 18. The 14 and 18 that's important. This is not seen in your A3. ***Continue to talk rubbish. I'm very fast deciding that he is not the inventor. He doesn't know anything.*** *"*

D

E

SP1: I tender my apology, Yang Arif.

F

YA: So we are marking A3? I only want him to answer question. I don't want him to talk."

f) **see AR Vol.2(1), p205-206**

G

"LKC: Yes, yes. Do you agree with me that what you brought to the patent agent is something that is already been patented?

SP1: I don't know.

H

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YA: *Do you agree- Now you know. You are asked to look at this US patent. You say that is similar to your P2 that you brought, the corner bead that you brought to your patent agent. Do you agree that the corned bead which you shown to your agent is something which has already been patented?* ***What do you mean you don't know? What do you mean you don't know?***

B

SP1: *I don't understand the question.*

C

YA: *Whether to ask him again? We are going to ask you until you understand.*

SP1: *Yes. I know something similar to this.*

D

YA: ***You remind him, with this kind of answer, he is not going to convince the Court he is the inventor of anything. You are not going to convince the Court anything you know.*** *You have no blueprint you have nothing. Even the application for patent to ask the patent agent to do for you. Instructions given where from the combination of words as well as that corner bead that you give. Now today you are shown the US patent from the US Patent Office from long time ago. Please. Not even yesterday. 1959. And then the picture there you agree that that is a diagram of corner bead and is similar to the one that you actually gave to a patent agent. So the question that is put to you was do you agree that the corner bead which you show to your agent to draw all the drawings and to make all the application for patent is something that has already been patented already.* ***Don't tell me you cannot understand the question anymore.***"

E

F

g) **see AR Vol.2(1), p222-223**

G

"*YA:* ***Listen la. If you're not listening to me how can you answer. That is why you are answering nonsense. Explain. Translate that. You are not listening to me. I don't want to tell you la. I can see why you are wrong.*** *You are simply having an idea in your mind, people asking different things you have a different thing in your mind and you are answering. I'm*

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trying to make clear to you but you don't want to listen. ***I stop and let your answer remain there disagree and sounds stupid. You have to tell him he is too smart for his own good.*** *If he wants to chit chat with the interpreter so be it. Carry on.*

B

h) **see AR Vol.2(1), p223-225**

C

"LKC: Based on his pleaded case, I'm going to put it to him that there is no assignment or license of use of this patent?

YA: Based on the Plaintiff's pleaded case, there is no assignment or license of use...

D

LKC: Of this patent. Agree?

SP1: I don't understand.

E

YA: ***He doesn't understand your translation or understand the question of to understand anything at all? You'll all wasting our time.***

SP1: I don't understand that even though that I obtained this license this does not belong to me.

F

LKC: I never said that.

YA: Ya. That was not the question. That was not the question. That's why you don't even understand. Based on the Plaintiff's pleaded case, there is no assignment or license of use of the patent.

G

PTJ: Yang Arif, the witness does not understand the Chinese word.

H

YA: Chinese word. He doesn't understand Chinese what can I do? I don't understand mandarin. I cannot help you.

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LKC: *Assignment and License he doesn't understand? Ok, I'll explain to him...*

YA: *Don't understand. 'I don't understand what is an assignment or license".*

B

PTJ: *Now the witness say that assignment is to assign me to use it or-*

YA: ***You understand or don't understand? Don't ask me question. I can't be bothered.***

C

LKC: *Can I move on?*

YA: ***I've recorded he doesn't understand first of all. After that he didn't understand assignment or license. So he doesn't understand anything. I don't know why he is in Court."***

D

i) **see AR Vol.2(1), p243**

"*LKC:* *Why not two rows? Why not four rows? Why three rows?*

E

SP1: *Basically it's enough.*

LKC: *Is enough. That is your answer?*

F

YA: ***Why, why, why two not three? Not four?***

LKC: *He is the inventor, he should be able to explain.*

G

YA: ***Ya, you are the inventor. Doesn't look like you know."***

j) **see AR Vol.2(1), p250-251**

"*YA:* ***Did he talk to anybody about the case over lunch?***

H

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SP1: No, Yang Arif. I did not.

YA: Who did you eat lunch with? Who did you eat lunch with? What? What is all that? Who did you eat lunch with?

B

SP1: I have my lunch together with my lawyer just now.

YA: So why are you pointing like that?

C

SP1: Because not only one Yang Arif.

YA: So what are you discuss?

D

SP1: We did not discuss much.

YA: Does everybody eat quietly?

E

SP1: Because we do not have much time.

YA: 2 hours. Ok. ***Very sure you discuss****. Cross continue."*

k) **see AR Vol.2(1), p251-252**

F

"LKC: Explain who is QO?

SP1: He is my patent agent, Yang Arif.

G

YA: I thought your patent agent had a name? No? QO Patent Sdn Bhd. You gave the name of your patent agent. It was not QO Patent Sdn Bhd.

SP1: He is the director of QO Patent Sdn Bhd.

H

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YA: *Who? Who is QO Patent Sdn Bhd?* ***Be very very careful yeah. We are talking about QO Patent Sdn Bhd. Be very very careful.***

SP1: *This is Tan Sin Su's company, Yang Arif.* B

YA: *Look at page 3. Page 3 of B1. See the word agent? Care of Quality Oracle Sdn Bhd. Nothing to do with QO Patent Sdn Bhd.* ***Talk more rubbish. You talk some more. You continue to talk like that.*** *Who is...Do you know QO Patent Sdn Bhd? Yes. So who is QO Patent Sdn Bhd?"* C

2. **Re-Examination of SP1**

a) **see AR Vol.2(2), p295-296** D

"JEL: *Yes. It was marked as P2. Can you explain what were the instruction you are talking about? The oral communication.*

SP1: *I told Mr Tan Sin Su that prior to the...last time we use hook for this product. Last time we do not have this product so we have to carve the...* E

YA: *This is in his witness statement. Do you need me to go and record write all of that again? It is admissive in his witness statement.*

F

JEL: *Yeah. Because we just wanted to confirm what-Maybe just break it into a brief.*

YA: ***He doesn't know. He doesn't know how to be brief.*** G

PTJ: *He was saying how to make it, how to carve it.*

YA: ***I don't want to know. I don't want to know.*** *Can you ask him something which perhaps we don't know, you need to clarify. If you are going to ask* H

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nim anything I can read the whole thing from his witness statement, I'm not going to have it.

B

JEL: Ok. I think if that is the case, maybe I'll just focus on the sample. Yang Arif but since the question was ask, can I just allowed this one answer to-

YA: ***No. that one answer is going to take me 15 minutes or more.***

C

JEL: But he is already answer in half way.

YA: That part don't want la. Struck it out. I to0ld you if you are going to ask him something in which he is going to tell me all last time we are all carved, and then is uneven, and therefore I come out with this thing and once we mold here and here, you have the channel. I don't want to know because is all in the witness statement.

D

JEL: Yes Yang Arif but in the witness statement it was not regarding-

E

YA: Enough.

JEL: Yang Arif.

F

YA: Enough. Go on with Re-examination, limited re-examination. Go to the area which are important.

JEL: Yes, Yang Arif. Because in the witness statement it is not regarding instruction given to Tan Sin Su yang Arif.

G

YA: Alright.

JEL: During cross the issue was

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YA: ***Do you want me to adjourn? Do you want me to adjourn? I can adjourn now. Obviously you don't want to listen. I say no need.***"

B

b) **see AR Vol.2(2), p321**

"JEL: *The put by my learned friend that all these products are – water drip line products – which are commonly available to the market.*

C

YA: *Which are commonly available to the market.*

JEL: *The answer was "yes". So I need to clarify the timeline. Mr Hong, can I refer you to the brochures, Bundle B2, starts at 191, you were put to page 191 and also 192 and also 198. So you were referred to all those brochures. And then you had confirmed for the learned counsel that all these products are commonly available in the market. Mr Hong, to your knowledge, when were those products – when did those products become available in the market?*

D

E

SP1: *After my patented products came up.*

YA: ***And you did nothing? You did nothing. He did nothing! After your patent came up, all these things become commonly available in the market and you didn't do anything! What was he doing?***

F

JEL: *He said he warned the First Defendant-*

YA: *Not the First Defendant, we are talking about 191, 192, 198. And these therefore would be different. Say Brothers. Who else, 191, 192.* ***You are talking rubbish. You know what you are doing? What kind of evidence are you giving?*** *We are talking about-"*

G

3. **Cross-examination of SP2**

H

a) **see AR Vol.2(2), p398**

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"LKC: When were you aware that the Plaintiff had filed this suit against the Defendant? When were you aware?

B

SP2: Only when I was asked-

YA: When? Tell me what year?

LKC: When

C

SP2: ...when I was asked to testify in this Court.

YA: When?

D

SP2: I think 2 weeks ago? I can't remember correctly.

*YA: **Something from 2 weeks ago you cannot remember. How to remember 2006?"***

E

b) **see AR Vol.2(2), p402**

"LKC: So can you tell what other companies you act, other than Hong Yik Plastic, for Hong Kong Ming?

F

SP2: Can't remember.

LKC: Can't remember. Its fine.

G

*YA: Alright. Hold on, hold on, I got something to write. "Cannot remember the names of the companies" and the **Court makes a note, this is unbelievable evidence.** A company secretary cannot remember the name of the companies for which he is company secretary. I **tell you out loud, when I see something not right, I don't just write and not tell you. I tell you that I look, this evidence is not believable. I cannot believe***

H

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A

a company secretary cannot remember the company for which he is company secretary. *Carry on."*

c) **see AR Vol.2(2), p413-414** B

"YA: This is not the first time you know! Look at me when I am talking to you. How many times do I have to tell you? When I am telling you something you are also talking. Not listening. Don't you realize what your evidence is? There was no invention! He was not shown any invention. He was shown that he wants to do something. But it is before the stage of the invention. Don't want to listen. He showed me this, he showed me that, how is he going to, this is the problem faced by everybody. What for? ***I am not impressed with him. I can tell you now.*** C D

JEL: Perhaps Mr Tan just answer directly-

YA: Listen to the question first! E

JEL: ...to the question. Just answer directly to the question. If you want to explain you can do it later.

YA: Nobody asked you anything don't say anything else. The answers we want to hear is not forthcoming. What did he show you? He want to show me, he want to explain to me all the problem everybody faced, how he want to resolve it – what for telling us all these things? We want to see his invention! This is his invention it will solve everybody's problems. This masterpiece. This is what we want! Which we did not see from your witness statement, we did not hear it from you, sit back senget-senget smile at me but the answers are not coming! Move on." F G

d) **see AR Vol.2(2), p416**

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"LKC: Did Mr Hong Kong Ming bring this to you, explain what it was and how it was used?

B

YA: Did Mr Hong Kong Ming show P2 to you, and explain how?

LKC: Explain what it was and how it was used.

YA: What it was and how it was used.

C

SP2: I can't remember.

YA: Alright this is the third 'cannot remember'. ***If there are too many answers of I cannot remember then I will say that you are a person with a poor memory. Which will make it questionable on the rest of your evidence****. This is a very easy way, just don't want to answer. 'Cannot remember, 'cannot remember.' This is the third or fourth."*

D

E e) **see AR Vol.2(2), p419-420**

"YA: The patent is being challenged. To protect your patent rights, whether or not you are the inventor. All those things what you have done should have been brought. You don't think so. Why? Because I already have this thing. ***This guy is being very foolish isn't it? Foolish to the extreme! How do you expect to protect it?***

F

SP2: My Lady can I explain?

G

YA: If I say I have a copyright to a book, or a song, I see people say "it is a beetle song la" I say 'no, no, no, it's mine. Before the Beetle sang it I already had it." I prove it, I took it to my childhood when I was 5 years old lah. The song is already singing and I have this old tape of it. I can do things like that. ***But if everything – I am not bothered. How are you going to defend the patent?***

H

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SP2: Allow me to explain My Lady-

YA: Why don't you answer my question first? Answer my question before you want to explain. B

*SP2: **Actually my answer is in my explanation.***

*YA: Wonderful witness. You got one that is says happily, this other one is the company secretary. Not forthcoming in his answers. He is a patent agent. This is a witness where the Court despite all the witness statement...the Court give you opportunity to call but this is the evidence that I am hearing. **It is bad. Not happy evidence. I have recorded 1, 2, 3, 4, 5, 6, 7 very defensive pages. Apart from this. I don't know where you want to go on. This is not good evidence.**"* C D

f) **see AR Vol.2(2), p421**

*"YA: Come bring. Amy, what in the world is he referring at? Bring it. Keep it. Anything else? Don't leave anything on his table! **So shameful! Should be a mad with so many degrees and you can't even bring all these things**. Everything you need is there. It is in the Bundles. Did you know about this? Counsel? That they are going to produce this. Keep them all! **Useless man**."* E F

g) **see AR Vol.2(2), p425-426**

"LKC: Do you have the instructions actually? G

SP2: There must be instructions otherwise the application won't be filed. But I don't have it now.

LKC: So do you have it in your office then? H

17

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A

SP2: I have to check, because it is 11 years ago this case.

YA: I don't care. I don't care. I don't care how long you have to take it. If
B *challenged you will need it, if not challenged you can keep it.*

LKC: Isn't it important for you to bring the evidence to Court?

YA: You think what, your patent registered then finished. The End. It's not. So
C *when challenged how are you going to defend it.*

LKC: It's in writing is it?

SP2: I can't remember-
D

YA: ***I want it – Counsel? Get it clearly from him that there is something in writing****. Because I won't give him a chance to adjourn it for him to produce it and he say I cannot find.* ***I am going to attribute it to him not telling the truth now.*** *If you don't have, say don't have. Don't waste my*
E *time.*

LKC: What's your answer Mr Tan?

F *SP2: I can't remember whether it is verbal or writing.*

LKC: So with regards to writing, your answer is I can't remember.

YA: Can't remember if instructions were oral or in writing. Okay can see don't
G *have it today. Imply that have it another day. Isn't it?* ***This man is trying to lead us around. Unfortunately for him, I do not have the time.*** *Okay?"*

H h) **see AR Vol.2(2), p443-444**

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"YA: *Okay. So this is in contradiction. Para SD in contradiction, contradicts his evidence in Court today.* ***Note, Statutory Declaration of witness contradicts his sworn evidence in Court today and has admitted. Hahaha wonderful****. This is there, the statutory declaration cannot run away from it. He maintains his answer. Did Hong Kong Ming ask you to file post-grant amendments, the answer is 'no' and 'yes', I maintain this answer'. So?*

B

C

LKC: *But he has affirmed it on oath in his SD to say that the Patentee wishes to make...*

YA: ***So he can be impeached. You actually can impeach his evidence. You can though. Once his evidence is impeached his entire evidence goes out the window****.*

D

LKC: *The witness can be impeached just based on this-*

E

YA: ***This witness can be impeached. ...Where do you want to go from here? You really have really bad witnesses. So I very sad. You really have a problematic witness. From this witness who should know better, to one who tells you that 'Yeah I cannot give you any valid evidence'. What do you want to do? Cause this is your last witness****."*

F

4. **Cross-examination of SP3**

a) **see AR Vol.2(2), p384-385**

G

"LKC: *So besides being an indirect customer of the Plaintiff, you are also connected as business partners with Mr Hong Kong Ming, the alleged owner of the patent. Inventor, sorry. Do you agree?*

SP3: *Yes.*

H

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YA: Agree.

LKC: Okay. I will put it to you that today when you sit in the stand you will not
B *be able to give an independent view. Do you agree?*

SP3: Yes.

YA: ***So? He is not an impartial witness.***
C

LKC: I think I can impeach him on the stand.

YA: You can impeach him when he said something that can be impeached.

D

LKC: But I will continue-

YA: ***But you can submit that his evidence is of no value. He is not an impartial witness.***

E

LKC: Yes. He agreed himself.

YA: ***Yes he said he is not going to give an independent view. He says it so there is no point. You cross examine him any further the Court will disregard his evidence. The Court will disregard his evidence.*** *You want to bring in people, bring la somebody who is independent. Independent customer, apart from being indirect ooh they are all together, sama-sama together in Geoform."*

F

G

b) **see AR Vol.2(2), p385-386**

"JEL: Not the language, My Lady. I mean the 'independent view', if I may request for my learned counsel to explain-

H

YA: No. He chose to speak in English. His witness statement is in English.

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JEL: *Yes but it is the understanding of the-*

YA: *No, you please don't say anything in the middle of cross examination that will give him an idea, the next thing he will say – I, I don't know, I don't understand But the fact remains that we already linked, we already seen his connection with the Plaintiff. The connection goes beyond indirect customer. They are together. Together, together Geoform.* ***And it is put to him that today in Court he is not going to be able to give independent view and he agrees. That is the end. There is no more value of further cross examination of this witness. No more. He is not independent.***

B

C

JEL: *My Lady that is will be subjected to re-examination of the witness.*

D

YA: *There is no need to cross there is no Re. No, the Court can see. It is of no value.*

JEL: *But perhaps My Lady if this issue may-*

E

YA: *Why am I going to allow someone who is impartial – who is partial to the Plaintiff to give evidence?"*

F

G

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LKC The Defendant says that you are not the inventor of this patent and they would like to invalidate your patent. They put you into strict proof. Other than your patent certificate, how else can you prove that you are the inventor?

YA How else can you prove you are the inventor of P1?

LKC Yes.

SP1 Yang Arif, prior to my invention of P1-

[witness answered halfway in mandarin but was interrupted]

YA Apart from your patent certificate, how else can you prove you are the inventor of P1? I don't want to hear any long story, how else can you prove you are the inventor?

SP1 I have my sample, Yang Arif.

YA Quote inverted comma. "I have my sample". Close inverted comma. Tell him that doesn't help.

LKC I would like to ask about the process of his invention. How he came up with this invention? How long did he take to come out with this invention?

YA How long did he take to come out with the invention?

SP1 One year plus, Yang Arif. I use one year plus to invent this p1.

LKC Can you share with us how you went about with this invention process? Did you do any research? Did you do a survey?

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A

SP1 Yes. I did research for this invention, Yang Arif.

LKC In the process of this invention, did he come out with drawings or any blueprints? B

SP1 No.

YA No. I did not come up with. C

SP1 No. I did not come out with the blueprints prior to this invention, Yang Arif. In fact I went to the site and have physical test on this product. D

YA We're talking about before he make the product. You're going to the site. We're talking about how you came out with the invention. You can't tiba –tiba go out to the site and test out the product. E

LKC So his answer is no drawing?

YA No Blueprint. F

SP1 Yes. Yang Arif. I do not have any blueprint.

YA So the question is how did you. What did you do? How did you did? You did research. You say you did research. So what did you do? G

SP1 I do researches prior to the invention of this P1 because at that time I - [witness answered halfway in mandarin but was interrupted]

YA We are we are. No. That's not answering the question. H

I

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SP1 I agree, Yang Arif.

YA Take note la counsel.

LKC Ok. Let's look at page 3, one page before.

PTJ Page 3 B1 referred, Yang Arif.

LKC At the top paragraph it says Malaysian patent. At sub paragraph 56 within that page, that's the bracket 56 at the right hand column. It say prior art I want to refer. Do you agree that there is no disclosure of this particularly listed prior art in your documents?

SP1 Yes.

LKC Does he agree with me that he should put it in because his patent now is being challenge?

JEL Sorry Yang Arif.

YA No. It should be in. He is the one who did all these. He gave all these.

JEL Yes, Yang Arif. But then the question is asking for the witness opinion. Do you agree you should, Do you agree you should not. These are all opinion evidence.

YA Not opinion. It is his case. This is not opinion. Sit down. You don't know what is opinion. Ok. Answer this question. Your invention is being challenge. All these detail should be in.

SP1 I do not agree personally.

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YA Do not agree that the details of prior art should be disclosed since my invention is being challenge. I'm asking him now what is prior art. Does he know or not? What is a prior art? It is not a lukisan.

SP1 I do not know what is the prior art.

YA How did you put these prior art in? 56 prior art. Question by court what is prior art. Answer do not know. If you do not know how did you put it in? If you do not know how can you answer that no need to disclose this.

SP1 Because I gave the patent agent to handle these Yang Arif.

YA Do not know. Question by court. If you do not know, how is this prior art stated at page 3 and the answer is I gave to my patent agent to do. All the more reason that he should be here.

LKC So the information we seek in this document today is it from him or that patent agent?

SP1 I was the one who furnish these information.

YA About the prior art? About the prior art is it? You say you don't know what is prior art you say you don't know. I ask you if you do not know how did you put in these prior art? You say you give to your patent agent to do. Now you say you give the information.

JEL Yang Arif-

YA Why are you jumping up and down and -

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JEL Because I think there is a confusion because the question here is all information here mainly if my learned friend can-

YA We are looking at the prior arts and I've been looking at the prior art. Please do not say anything that gives answer. We're in cross examination. Be very careful. Well you may not try but if that has the effect I'll be very annoyed. Please sit down.

JEL I'm sorry Yang Arif, basically I just want to clarify that the question is about the prior art because if it is not.

YA Sit down. Sit down. Sit. Listen, you tell him I'm getting very annoyed. We're now at prior art and in this area of prior art I make I ask three separate question which I've noted as question by court and all of them is about prior art and the reason why we're interested in knowing more is that when you ask what is prior art because I myself I thought I know, I've my suspicion what is prior art because I want to hear from you, you are the inventor and the one who produce this gave information of all these to the patent agent. So I ask you what is prior art. Your answer is do not know and I ask a question if you do not know how then does this prior art get into this page. And the answer is "I gave to my patent agent to do" which is why counsel come up with the question eh this things you do or patent agent do.

SP1 Yang Arif, for this document, for those technical things, I was the one who furnish. For those wording and those legal things was done by my patent agent.

YA Prior art is technical or legal or what?

SP1 This is documentation. Prior art.

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A

1

2 **YA** I don't know I don't know. Court notes from witnesses answers, the court's
3 suspicions are as to whether it is the witness who is the source of pages 4-17 B
4 or the patent agent or mix of both. Does it mean therefore we have to go
5 through each and every page 4 to 17 to find out which part of it is his and
6 which part of it is the patent agent's. Because it would look from just from a
7 page 4 we're already left in doubt. So I have placed my suspicions as to C
8 whether the witness is the author of pages 4 to 17... 3 to 17 if at 3 itself we
9 already have doubt. So it may be necessary therefore to go through each and
10 every page.
11
12 **LKC** Yang Arif, I only wish to pick on 2 issues further on this. I don't want to be too D
13 technical and I don't think he is able answered. So I am going to-
14
15 **YA** But he is the inventor he should be answer. It's in his interest if he cannot E
16 answer.
17
18 **LKC** Ok. Let's move on. Can we refer him to page 14 drawings?
19
20 **PTJ** Page 14 B1 refers. F
21
22 **LKC** What type of drawings is this? Hand drawn or computer drawn?
23
24 **SP1** Computer drawing, Yang Arif. G
25
26 **LKC** Be specific. Is it Computer Aided Drawing, we call it CAD drawing?
27
28 **SP1** I don't know. H
29
30 **LKC** Who came up with the drawing?

I

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SP1 The witness was mentioned, the witness say A3.

B

YA What A3?

SP1 Sample.

C

JEL These are the samples.

LKC Let him choose.

D

JEL I'm just going to pass this to him.

LKC What you passed to the agent?

E

SP1 Yang Arif, I passed this to the patent agent.

YA Give me. No la. Cannot be la. I look at it and I know it cannot be. Ok, it's wrong. I don't need to have a patent also i know is wrong. You look at that and you look at page 14. Where are the two strips there? The two lines which should come out?

F

SP1 [not translated]

G

YA The question is yes; I gave the patent agent something to look at. I informed him as well as I gave him something to see. So question do you have the thing that you show to the patent agent? The thing that you show him and he draw this. Yes, it is A3. I look at A3 is wrong.

H

SP1 Because the patent agent do not know how to draw it out so I need something to show it to him to let him see to enable him to come out with the drawing.

I

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YA But if the patent agent follow that he wouldn't get page 14. Court notes I have look at A3 and it is clear that A3 and the drawings on page 14 are different.

SP1 Yang Arif, the witness said that although this two-
[the witnesss answered half way in mandarin but was interrupted]

YA You ask- Patent agent don't know anything. He is not the inventor. You are the inventor. Ask him to draw, you told, told, told, you tell, tell, tell, whether I can draw then you say you give him something to see. This thing to see together with what you tell him then he drew. Therefore this thing should have those identical things that's why you can draw the lines, the grids, the 14 and 18. The 14 and 18 that's important. This is not seen in your A3. Continue to talk rubbish. I'm very fast deciding that he is not the inventor. He doesn't know anything.

SP1 I tender my apology, Yang Arif.

YA So we are marking A3? I only want him to answer question. I don't want him to talk.

LKC Ok. I'm going to put it to him what he had just show the Court there is a sticker on it that's says HYPA3M, is that what his label is?

SP1 Yes, Yang Arif. I was the one who put this label- HYPA3M.

YA I was the one who put what?

SP1 The label –HYPA3M

YA HYT?

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LKC Just now I stop at US Patent Drawing.

YA Similar to P2.

LKC Yes, yes. Do you agree with me that what you brought to the patent agent is something that is already been patented?

SP1 I don't know.

YA Do you agree- Now you know. You are asked to look at this US patent. You say that is similar to your P2 that you brought, the corner bead that you brought to your patent agent. Do you agree that the corner bead which you shown to your agent is something which has already been patented? What do you mean you don't know? What do you mean you don't know?

SP1 I don't understand the question.

YA Whether to ask him again? We are going to ask you until you understand.

SP1 Yes. I know something similar to this.

YA You remind him, with this kind of answer, he is not going to convince the Court he is the inventor of anything. You are not going to convince the Court anything you know. You have no blueprint you have nothing. Even the application for patent you ask the patent agent to do for you. Instructions given where from the combination of words as well as that corner bead that you give. Now today you are shown the US patent from the US Patent Office from long time ago. Please. Not even yesterday. 1959. And then the picture there you agree that that is a diagram of corner bead and is similar to the one that you actually gave

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to a patent agent. So the question that is put to you was do you agree that the corner bead which you show to your agent to draw all the drawings and to make all the application for patent is something that has already been patented already. Don't tell me you cannot understand the question anymore.

B

SP1 Correct.

C

YA And now say I agree. If is the corner bead that is something that already been patented. Does the Plaintiff wish to reconsider his case?

JEL I'm sorry, Yang Arif?

D

YA You're not with me? Day dreaming. In light of all his answer now, we know how it go. His invention, so to speak, is being queried, is being challenged. An inventor should be very able to show the court how he came up with the invention. I recalled that I mention that it took how many years? 6 years, 7 years for the patent office to actually gave him a patent. That is one issue on the side. The other thing is now in court today on a challenge you must now show to me that, 'hey I'm the inventor, from scratch I came up with a feather, with this feather which has a little bit of thing and then it fell into some color then I realized I could write for quite a while with it and from that I try to develop something that can be attached to the tip so that there'll be a continue flow of color so I can write longer and after that the second ring blabla and eventually I invented a fountain pen'. Who invented the fountain pen? God knows but as an example I can show steps of the way how I did it and eventually I sent it for patents and now I patented all the fountain pens. Parker, Sheafer, better pay me my patent. So when challenged somebody says I got it I can show when I started what year how I progress. Now we come to this plaintiff PW1, he is not showing me anything you know. But the worst thing is that there is a US Patent for the same thing. The corner bead. But the problem

E

F

G

H

I

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LKC Ok. I'll ask him that would he agree with me that AGL26 is a variant of corne bead family?

SP1 No.

LKC No. I'll take note of that answer. I'll take note of that answer. I want to put it tc him that ID6 is merely a combination of a corner bead and a groove joint?

SP1 That is not so. CL4 is one piece and corner bead and groove joint is actually two pieces.

YA We are talking about ID6. ID6 is AGL2-6.

LKC Yes.

YA The question is that ID6 which is AG, AGL, AGY-

LKC AGL.

YA AGL2-6 is a variant is merely a combination.

SP1 [answer given in mandarin but not translated]

YA Listen la. If you're not listening to me how can you answer. That is why you are answering nonsense. Explain. Translate that. You are not listening to me. I don't want to tell you la. I can see why you are wrong. You are simply having an idea in your mind, people asking different things you have a different thing in your mind and you are answering. I'm trying to make clear to you but you don't want to listen. I stop and let your answer remain there disagree and

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sounds stupid. You have to tell him he is too smart for his own good. If he wants to chit chat with the interpreter so be it. Carry on.

B

LKC What is the last answer?

YA Disagree.

C

LKC Disagree. Ok. Now I'm going to ownership question. Look back at the patent certificate just now.

PTJ Page 1 B1 refers.

D

LKC Who is the owner of this invention?

SP1 Hong Yik Plastic, Yang Arif.

E

LKC The Plaintiff?

SP1 Yes, the Plaintiff company, Yang Arif.

F

LKC Based on his pleaded case, I'm going to put it to him that there is no assignment or license of use of this patent?

YA Based on the Plaintiff's pleaded case, there is no assignment or license of use...

G

LKC Of this patent. Agree?

SP1 I don't understand.

H

I

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YA He doesn't understand your translation or understand the question or to understand anything at all? You'll all wasting our time.

SP1 I don't understand that even though that I obtained this license this does not belong to me.

LKC I never said that.

YA Ya. That was not the question. That was not the question. That's why you don't even understand. Based on the Plaintiff's pleaded case, there is no assignment or license of use of the patent.

PTJ Yang Arif, the witness does not understand the Chinese word.

YA Chinese word. He doesn't understand Chinese what can I do? I don't understand mandarin. I cannot help you.

LKC Assignment and License he doesn't understand? Ok, I'll explain to him...

YA Don't understand. 'I don't understand what is an assignment or license.'

PTJ Now the witness say that assignment is to assign me to use it or to-

YA You understand or don't understand? Don't ask me question. I can't be bothered.

LKC Can I move on?

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YA I've recorded he doesn't understand first of all. After that he didn't understand assignment or license. So he doesn't understand anything. I don't know why he is in Court.

LKC You called your intention throating for forming a groove on a ledge. Throating for forming a groove on a ledge, this is the words they described their invention as such. Page 3 can see. The title also is.

SP1 Yes. Correct.

LKC Ok. Now you look at your answer in question 5 at page 3. At the bottom of the last paragraph the answer in page... question 5, the Plaintiff produces plastic proteins according to the patent under their product or the CL2 chrout line, CL4 chrout line, and CL5 chrout line.

YA Witness statement the last paragraph of the answer 5.

SP1 Yes.

LKC Okay. Is there any sample for us to look at? CL2, CL4, CL5.

SP1 No. I have CL4 here, Yang Arif.

LKC Is it P1? Can you show it?

SP1 P1, Yang Arif.

LKC But nothing for CL2 and CL5?

SP1 I did not bring them.

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LKC Why not two rows? Why not four rows? Why three rows?

SP1 Basically it's enough.

LKC Is enough. That is your answer?

YA Why, why, why two not three? Not four?

LKC He is the inventor, he should be able to explain.

YA Ya, you are the inventor. Doesn't look like you know.

SP1 Because at that time I consider that it is enough, sufficient.

LKC Sufficient. Ok. Go and compare his HYPCL4, P1. Your registered proprietor product.

SP1 Yes.

LKC How many rows of plurality of perforation can be find?

SP1 Two.

LKC Is it the same as your patent registered as seen in the picture drawing?

SP1 No. Not the same.

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A

1

2 Sambungan Pemeriksaan Balas (Continued Cross Examination) Hong Kong
3 Ming oleh LK Chow
4 Masa: 2:37 PM B
5

6 **JEL** Yang Arif, parties as before. Continue with cross examination.
7

8 **PTJ** Yang Arif, witness is reminded that he is on his own oath. C
9

10 **YA** Did he talk to anybody about the case over lunch?
11

12 **SP1** No, Yang Arif. I did not. D
13

14 **YA** Who did you eat lunch with? Who did you eat lunch with? What? What is all
15 that? Who did you eat lunch with?
16 E
17 **SP1** I have my lunch together with my lawyer just now.
18

19 **YA** So why are you pointing like that?
20 F
21 **SP1** Because not only one Yang Arif.
22

23 **YA** So what are you discuss?
24

25 **SP1** We did not discuss much. G
26

27 **YA** Does everybody eat quietly?
28

29 **SP1** Because we do not have much time. H
30

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A

1 **YA** 2 hours. Ok. Very sure you discuss. Cross continue.
2
B 3 **LKC** Mr. Hong, do you know who is QO Patent Sdn Bhd?
4
5 **YA** Q... QO?
6
7 **LKC** QO Patent Sdn Bhd.
C 8
9 **YA** QHO? HO?
10
11 **LKC** QO, letters of Q and O Patent Sdn Bhd.
D 12
13 **SP1** Yes.
14
15 **LKC** Explain who is QO?.
E 16
17 **SP1** He is my patent agent, Yang Arif.
18
19 **YA** I thought your patent agent had a name? No? QO Patent Sdn Bhd. You gave
20 the name of your patent agent. It was not QO Patent Sdn Bhd.
F 21
22 **SP1** He is the director of QO Patent Sdn Bhd.
23
24 **YA** Who? Who is QO Patent Sdn Bhd? Be very very careful yeah. We are talking
G 25 about QO Patent Sdn Bhd. Be very very careful.
26
27 **SP1** This is Tan Sin Su's company, Yang Arif.
28
H 29 **YA** Look at page 3. Page 3 of B1. Page 3. See the word agent? Care of Quality
30 Oracle Sdn Bhd. Nothing to do do with QO Patent Sdn Bhd. Talk more rubbish.

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You talk some more. You continue to talk like that. Who is... Do you know QO Patent Sdn Bhd. Yes. So who is QO Patent Sdn. Bhd?

B

SP1 QO Patent Sdn Bhd is a company owned by... is Tan Sin Su's company.

LKC But QO Patent Sdn Bhd is not a patent agent as seen in the...

C

YA Page 3.

LKC Page 3.

SP1 I don't know.

D

YA What you mean by you don't know? QO Patent Sdn Bhd is not the company of your patent agent as seen in B1 Page 3 so there we see it is agent Tan Sin Su Quality Oracle.

E

LKC Ok.

YA What is the answer? Don't know how to answer?

F

SP1 Yes. I don't know how to answer the question.

YA Sure. Very good.

G

LKC What is the involvement of QO Patent Sdn Bhd to our case?

SP1 Actually he is my patent agent.

H

YA Actually the QO Patent cannot be a 'he'.

I

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A

1 **YA** Ok.
2
B 3 **JEL** Only for this morning. My learned friend had asked about how did you instruct
4 Mr Tan Sin Su for the drafting of your patent. You explain that you had given
5 instructions to Mr Tan Sin Su. Can you briefly explain what-
6
C 7 **YA** No. He gave verbal description. First of all he gave verbal.
8
9 **JEL** Yes. Is verbal.
10
D 11 **YA** After verbal baru he go and give that piece.
12
13 **JEL** Yes. Correct. So you have mention you gave verbal communication and also the
14 physical sample which is P2.
15
E 16 **YA** P2?
17
18 **JEL** Yes. It was marked as P2. Can you explain what were the instruction you are
19 talking about? The oral communication.
F 20
21 **SP1** I told Mr Tan Sin Su that prior to the ... last time we use hook for this product.
22 Last time we do not have this product so we have to carve the...
23
G 24 **YA** This is in his witness statement. Do you need me to go and record write all of
25 that again? It is admissive in his witness statement.
26
27 **JEL** Yeah. Because we just wanted to confirm what- Maybe just break it into a brief.
H 28
29 **YA** He doesn't know. He doesn't know how to be brief.
30

I

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PTJ He was saying how to make it, how to carve it.

YA I don't want to know. I don't want to know. Can you ask him something which perhaps we don't know, you need to clarify. If you are going to ask him anything I can read the whole thing from his witness statement, I'm not going to have it.

JEL Ok. I think if that is the case, maybe I'll just focus on the sample. Yang Arif but since the question was ask, can I just allowed this one answer to-

YA No. That one answer is going to take me 15 minutes or more.

JEL But he is already answer in half way.

YA That part don't want la. Struck it out. I told you if you are going to ask him something in which he is going to tell me all last time we are all carved, and then is uneven, and therefore I come out with this thing and once we mold here and here, you have the channel. I don't want to know because is all in the witness statement.

JEL Yes Yang Arif but in the witness statement it was not regarding-

YA Enough.

JEL Yang Arif.

YA Enough. Go on with Re-examination, limited re-examination. Go to the area which are important.

JEL Yes, Yang Arif. Because in the witness statement it is not regarding instruction given to Tan Sin Su yang Arif.

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1 **JEL** I am referring to the put-
2
3 **YA** The Whoot?
B 4
5 **JEL** The put by my learned friend that all these products are – water drip line
6 products – which are commonly available to the market.
7
C 8 **YA** Which are commonly available to the market.
9
10 **JEL** The answer was "yes". So I need to clarify the timeline. Mr Hong, can I refer
11 you to the brochures, Bundle B2, starts at 191, you were put to page 191 and
D 12 also 192 and also 198. So you were referred to all those brochures. And then
13 you had confirmed for the learned counsel that all these products are
14 commonly available in the market. Mr Hong, to your knowledge, when were
15 those products – when did those products become available in the market?
E 16
17 **SP1** After my patented products came up.
18
19 **YA** And you did nothing? You did nothing. He did nothing! After your patent came
F 20 up, all these things become commonly available in the market and you didn't do
21 anything! What was he doing?
22
23 **JEL** He said he warned the First Defendant –
24
G 25 **YA** Not the First Defendant, we are talking about 191, 192, 198. And these
26 therefore would be different. Say Brothers. Who else, 191, 192. You are talking
27 rubbish. You know what you are doing? What kind of evidence are you giving?
28 We are talking about –
H 29
30 **SP1** -at a later stage-

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YA Please answer verbally without nodding. Look at him, look at him, I told him to say verbally he...

B

JEL You need to mention verbally yes or no.

YA 'mm' mm' mm' is not counted.

C

SP2 Okay.

YA Mr Tan.

D

SP2 Yes.

YA Your evidence is captured by the CRT. They cannot capture you. They can capture 'yes' or 'no'. They cannot understand your 'mm' mm' mm'. Do you understand?

E

SP2 Yes I understand now.

F

YA So what is your answer?

SP2 Around 30.

G

LKC Okay. My next question, when will –

YA Hold on. Yes.

H

LKC When were you aware that the Plaintiff had filed this suit against the Defendant? When were you aware?

I

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1 **YA** Such wonderful company secretary you choose, joel?
2
B 3 **SP2** Yes.
4
5 **LKC** So can you tell what other companies you act, other than Hong Yik Plastic, for
6 Hong Kong Ming?
7
C 8 **SP2** Can't remember.
9
10 **LKC** Can't remember. Its fine.
11
D 12 **YA** Alright. Hold on, hold on, I got something to write. "Cannot remember the
13 names of the companies" and the Court makes a note, this is unbelievable
14 evidence. A company secretary cannot remember the name of the companies
15 for which he is company secretary. I tell you out loud, when I see something
E 16 not right, I don't just write and not tell you. I tell you that I look, this evidence
17 is not believable. I cannot believe a company secretary cannot remember the
18 company for which he is company secretary. Carry on.
19
F 20 **LKC** Can you at least tell us how long have you known this Mr Hong Kong Ming?
21
22 **SP2** I first know him –
23
24 **YA** I have known... Hong Kong Ming. Since? Year? Since?
G 25
26 **SP2** 2006.
27
28 **LKC** Do you mind telling us when in 2006?
H 29
30 **YA** When in 2006?

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A

YA The best thing to show is to show the invention isn't it?

LKC Yes.

B

YA You are there to do his patent. Show the invention la. I thought u say he show you the invention.

C

SP2 My Lady –

YA Listen la when I am talking! Don't talk la. I am leaving. Can you please tell the witness when I am talking keep quiet. Tell him now.

D

JEL Yes My Lady. Mr Tan perhaps just refrain from that.

SP2 Yes.

E

YA This is not the first time you know! Look at me when I am talking to you. How many times do I have to tell you? When I am telling you something you are also talking. Not listening. Don't you realize what your evidence is? There was no invention! He was not shown any invention. He was shown that he wants to do something. But it is before the stage of the invention. Don't want to listen. He showed me this, he showed me that, how he is going to, this is the problem faced by everybody. What for? I am not impressed with him. I can tell you now.

F

G

JEL Perhaps Mr Tan just answer directly –

YA Listen to the question first!

H

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JEL ...to the question. Just answer directly to the question. If you want to explain you can do it later.

B

YA Nobody asked you anything don't say anything else. The answers we want to hear is not forthcoming. What did he show you? He want to show me, he want to explain to me all problem everybody faced, how he want to resolve it – what for telling us all these things? We want to see his invention! This is his invention it will solve everybody's problems. This masterpiece. This is what we want! Which we did not see from your witness statement, we did not hear it from you, sit back senget-senget smile at me but the answers are not coming! Move on.

C

D

LKC Just now you said samples. Samples. What are those?

SP2 Those are already existing in the market, And how he would solve the problem that the existing devices could not solve.

E

LKC Existing products in the market.

SP2 Yes.

F

LKC Would you be able to recognize the product if we show you today?

YA Hold on. You showed me samples that are already existing in the market and how – girls what did you all write?

G

JEL And how he would solve-

YA And how? And how –

H

JEL How he would solve the problem that the existing product could not solve.

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YA Recognize. Can you recognize this? Yes No? Can you recognize this? Yes No?

SP2 No.

LKC Did Mr Hong Kong Ming bring this to you, explain what it was and how it was used?

YA Did Mr Hong Kong Ming show P2 to you, and explain how?

LKC Explain what it was and how it was used.

YA What it was and how it was used

SP2 I can't remember.

YA Alright this is the third 'cannot remember'. If there are too many answers of I cannot remember then I will say that you are a person with a poor memory. Which will make it questionable on the rest of your evidence. This is a very easy way, just don't want to answer. 'Cannot remember', 'cannot remember.' This is the third or fourth.

LKC How was the information and instructions related to you by Mr Hong Kong Ming? You said the information and instructions were given to you. How was it given to you?

SP2 He explained to me at the site that we visited, as well as some samples and the sketches how he would – how his invention would be –

YA It doesn't make sense. It doesn't make sense. Explain to me at the site what? He explain to me at the site about what?

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YA Very good. We wouldn't, wouldn't keep the sketches. Okay. So when challenged everything goes down lah?

SP2 Because we already have the actual drawings for the patent application.

YA The patent is being challenged. To protect your patent rights, whether or not you are the inventor. All those things what you have done should have been brought. You don't think so. Why? Because I already have this thing. This guy is being very foolish isn't it? Foolish to the extreme! How do you expect to protect it?

SP2 My Lady can I explain?

YA If I say I have a copyright to a book, or a song, I see people say "it is a beetle song la" I say 'no, no, no, its mine. Before the Beetle sang it I already had it." I prove it, I took it to my childhood when I was 5 years old lah. The song is already singing and I have this old tape of it. I can do things like that. But if everything – I am not bothered. How are you going to defend the patent?

SP2 Allow me to explain My Lady –

YA Why don't you answer my question first? Answer my question before you want to explain.

SP2 Actually my answer is in my explanation.

YA Wonderful witness. You got one that is says happily, this other one is the company secretary. Not forthcoming in his answers. He is a patent agent. This is a witness where the Court despite the all the witness statement... the Court give you opportunity to call but this is the evidence that I am hearing. It is bad.

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Not happy evidence: I have recorded 1, 2, 3, 4, 5, 6, 7 very defensive pages. Apart from this. I don't know where you want to go. This is not good evidence.

B

LKC So as a summary, you do not have any prototype, you do not have any sketches, you do not have any actual samples to show to this Court today about this particular patent. Agree?

C

YA Hold on. Prototype, sketches, actual samples of the?

LKC To show to the Court today.

D

YA To show to the Court today – To show to the Court today.

LKC Agree?

E

YA About this particular invention.

SP2 The drawing –

F

YA Prototype. Sketches. Actual samples. You do not have any prototypes, sketches or samples of the invention to show the Court today. Agree, don't have. Disagree, have, show me.

SP2 Disagree.

G

YA Disagree. Then show me? Prototype?

SP2 You see in our practice –

H

YA Protoype. Where page what?

I

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SP2 In our practice, once our formal drawing drawn out, we don't keep the sketches anymore. So these is actual drawings that are produced from the sketches. I believe you ask any patent agent –

YA Do you – We don't want to ask anybody the witness is on the stand! Do you – you do not have any prototype, sketches or sample to show to the Court today. You disagree. So now you show me the prototype, sketches, actual samples. Otherwise, you must agree you don't have. And try to explain "in our practice" but don't say you disagree but you don't give.

SP2 There is actual drawings already-

YA You disagreed. Show me now.

LKC If you want to show –

YA Prototype or sketches. You cannot have your cake and eat it too.

LKC He is referring to something. Let's see-

YA Come bring. Amy, what in the world is he referring at? Bring it. Keep it. Anything else? Don't leave anything on his table! So shameful! Should be a man with so many degrees and you can't even bring all these things. Everything you need is there. It is in the Bundles. Did you know about this? Counsel? That they are going to produce this. Keep them all! Useless man.

LKC So what are you producing? You want to refer to that page. Is that what you are referring to?

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LKC You don't have it today.

B

YA So you mean there are instructions but you don't have it today?

SP2 This definitely –

C

YA Be very careful. If you have instructions but you don't have it today, I give another date I expect to see the instructions. And then you cannot produce it, it shows that you are lying today. Can you show any instructions given to you in writing? The answer I recorded thus far is no, I don't have it today.

D

LKC DO you have the instructions actually?

SP2 There must be instructions otherwise the application won't be filed. But I don't have it now.

E

LKC So do you have it in your office then?

SP2 I have to check, because it is 11 years ago this case.

F

YA I don't care. I don't care. I don't care how long you have to take it. If challenged you will need it, if not challenged you can keep it.

G

LKC Isn't it important for you to bring the evidence to Court?

YA You think what, your patent is registered then finished. The End. It's not. So when challenged how are you going to defend it.

H

LKC It's in writing is it?

I

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SP2 I can't remember-

YA I want it – Counsel? Get it clearly from him that there is something in writing. Because I won't give him a chance to adjourn it for him to produce it and he say I cannot find. I am going to attribute it to him not telling the truth now. If you don't have, say don't have. Don't waste my time.

LKC What's your answer Mr Tan?

SP2 I can't remember whether it is verbal or writing.

LKC So with regards to writing, your answer is I can't remember.

YA Can't remember if instructions were oral or in writing. Okay can see don't have it today. Imply that have it another day. Isn't it? This man is trying to lead us around. Unfortunately for him, I do not have time. Okay?

LKC Yang Arif just now you mentioned you have to stop at for right?

YA No, no, no.

LKC Can continue?

YA That was this morning. I wanted to stop at 12.

LKC 12?

YA We can go on until 5.

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LKC Now I am going to lead you to page 44 of your Bundle. Page 44 is your Statutory Declaration. B

YA B7.

LKC Yes. It is an SD that you filed at the point when you filed your post-grant amendments. That was one of the documents that was required. And if you look at paragraph 4, it says "the patentee wishes to make post-grant amendments to the patent's specifications. These amendments are within the scope of the invention originally filed." Now Mr Tan, based on your answer awhile ago, do you remember what you answered? Do you recall? Do you still maintain your answer? C D

SP2 No. E

LKC So you are changing your answer?

SP2 No I still maintain my answer 'Yes'. F

YA Okay. So this is in contradiction. Para SD in contradiction, contradicts his evidence in Court today. Note, Statutory Declaration of witness contradicts his sworn evidence in Court today and has admitted. Hahaha wonderful. This is there, the statutory declaration cannot run away from it. He maintains his answer. Did Hong Kong Ming ask you to file post-grant amendments, the answer is 'no' and 'yes, I maintain this answer'. So? G

LKC But he has affirmed it on oath in his SD to say that the Patentee wishes to make... H

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YA So he can be impeached. You actually can impeach his evidence. You can though. Once his evidence is impeached his entire evidence goes out of the window.

LKC This witness can be impeached just based on this –

YA This witness can be impeached. One of them is the Statutory Declaration, which is clear. No ambiguity. "The Patentee wishes to make post-grant amendments to the patent specifications" meaning Hong Kong Ming Yang minta. And in Court today when asked 'Did Hong Kong Ming ask you to put in post-grant amendments', answer ' No', 'Yes, maintain this answer.' So not only is no, he maintains it. So the answer is correct. So we have sworn evidence today in Court. 'No, Hong Kong Ming did not ask me to make' and statutory declaration 'Patentee wishes to make'. So there is a contradiction it can be impeached. Where do you want to go from here? You really have really bad witnesses. So I very sad. You really have a problematic witness. From this witness who should know better, to one who tells you that 'Yeah I cannot give you any valid evidence'. What do you want to do? Cause this is your last witness.

JEL Yes My Lady.

YA This is the end. You are relying on PW1 and this PW2 and PW3 forget it.

JEL Yes.

YA PW2 also almost forget it. I tell you he cannot tell you anything because he did not do any of the patent. This is a challenge to a patent.

JEL Yes.

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LKC So besides being an indirect customer of the Plaintiff, you are also connected as business partners with Mr Hong Kong Ming, the alleged owner of the patent. Inventor, sorry. Do you agree?

B

SP3 Yes.

YA Agree.

C

LKC Okay. I will put it to you that today when you sit in the stand you will not be able to give an independent view. Do you agree?

SP3 Yes.

D

YA So? He is not an impartial witness.

LKC I think I can impeach him on the stand.

E

YA You can impeach him when he said something that can be impeached.

LKC But I will continue –

F

YA But you can submit that his evidence is of no value. He is not an impartial witness.

LKC Yes. He agreed himself.

G

YA Yes he said he is not going to give an independent view. He says it so there is no point. You cross examine him any further the Court will disregard his evidence. The Court will disregard his evidence. You want to bring in people,

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bring la somebody who is independent. Independent customer, apart from being indirect ooh they are all together, sama-sama together in Geoform.

JEL Yes Yang Arif. If I may-

YA I mean the, the Plaintiff has a million customers. Why must you choose somebody who cannot give independent view.

JEL I am not sure if the witness understand –

YA No. He chose to speak English. Don't start. Don't start.

JEL Not in language. Not in language.

YA Then you go and get the lousy interpreter that we met yesterday.

JEL Not the language, My Lady. I mean the 'independent view', if I may request for my learned counsel to explain –

YA No. He chose to speak in English. His witness statement is in English.

JEL Yes but it is the understanding of the –

YA No, you please don't say anything in the middle cross examination that will give him an idea, the next thing he will say – I, I don't know, I don't understand. But the fact remains that we already linked, we already seen his connection with the Plaintiff. The connection goes beyond indirect customer. They are together. Together, together Geoform. And it is put to him that today in Court he is not going to be able to give independent view and he agrees.

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That is the end. There is no more value of further cross examination of this witness. No more. He is not independent.

JEL My Lady that is will be subjected to the re-examination of the witness.

YA There is no need to cross there is no Re. No, the Court can see. It is of no value.

JEL But perhaps My Lady if this issue may –

YA Why am I going to allow someone who is impartial – who is partial to the Plaintiff to give evidence?

JEL My Lady the thing is'–

YA The thing is you chose this witness.

JEL Yes My Lady. The question is this – the question is when you are in the stand you will not be able to give an independent view.

YA We are in the middle of cross examination. Don't say anything more.

JEL Then I will request for leave for the cross to continue.

YA No. Depends on her. If she wants to continue she continues. If she don't want to continue that's it. The rest of it you submit and your re-examination is limited to what is crossed.

JEL Yes My Lady then my re-examination will be limited to whatever is crossed.

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Order accordingly.

Reported by Ashok Kumar